Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-963

In the Supreme Court of the United States

OCTOBER TERM, 1979

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

JEROME M. FEIT
BARBARA J. WELLER
Attorneys
Federal Energy Regulatory Commission
Washington, D.C. 20426

INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statute and regulation involved 2

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

Acker v. *United States*, 298 U.S. 426 6

Algonquin Gas Transmission Co. v. *FPC*, 534 F. 2d 952 9

Atlantic Refining Co. v. *Public Service Commission New York*, 360 U.S. 378 6

FPC v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 6

Trunkline Gas Co., 54 F.P.C. 1087 ..... 5, 9

Udall v. *Tallman*, 380 U.S. 1 (1965) 6-7

Statutes and regulation:

Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, 42 U.S.C. (Supp. I) 7172(a) (1)(C), (D), (E) and (F) 1

Page

Statutes and regulation—(Continued):

Natural Gas Act, 15 U.S.C. 717-717w 1
Section 4, 15 U.S.C. 717c 3, 9, 10
Section 5, 15 U.S.C. 717d 3
Section 7(e), 15 U.S.C. 717f(e) 2
18 C.F.R. 2.65 ..... 2, 5, 6
18 C.F.R. 2.65(a)(4) 2, 3, 7
18 C.F.R. 2.65(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-963

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 589 F. 2d 186. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. B-E) are not reported.[1]

[1]Under Section 402(a)(1)(C),(D),(E), and (F) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, 42 U.S.C. (Supp. I) 7172(a)(1)(C), (D), (E), and (F), this agency has succeeded to the relevant functions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. A petition for rehearing was denied on September 20, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on December 19, 1979 The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission, in issuing a certificate of public convenience and necessity authorizing the construction of a natural gas pipeline, may properly condition the certificate so as to permit the recovery of the costs of such construction in future rate proceedings based on the actual use of not less than 60 percent of the pipeline's capacity.

STATUTE AND REGULATION INVOLVED

Section 7(e) of the Natural Gas Act, 15 U.S.C. 717f(e), and 18 C.F.R. 2.65 are reprinted at Pet. App. 34a-36a.

STATEMENT

In 1968, the Commission incorporated in its regulations a general statement of policy concerning applications for certificates of public convenience and necessity for the construction and operation of pipeline transmission facilities in the offshore Southern Louisiana area. These regulations sought to achieve the optimum use of offshore, high cost pipeline facilities and thus to minimize the expense of developing offshore gas reserves, by discouraging the construction of unnecessary, duplicative and over-sized facilities and encouraging the joint utilization of large diameter pipelines in the offshore area. 39 F.P.C. 925 (1968). Thus, 18 C.F.R. 2.65(a)(4) requires that an applicant for a certificate

demonstrate that, by the end of a 12-month period following installation, the proposed facilities will be utilized to a level of at least 60 percent of the "annual capacity available." In turn, 18 C.F.R. 2.65(b) provides that:

> It is the intention of the Commission to enforce the [60%] requirement [of 18 C.F.R. 2.65(a) (4)] by permitting offshore pipeline facilities, certificated after the date of this order, to be included in Applicant's cost-of-service in future rate proceedings at an average unit cost predicated upon load factors of not less than 60 percent of the annual capacity available.

In June 1977, petitioner, Transcontinental Gas Pipe Line Corporation ("Transco") sought authorization to construct a major extension of one of its natural gas pipelines off the Louisiana coast. There being no opposition to the application, the Commission issued the certificate with the 60 percent condition (Pet. App. 18a). The Commission denied Transco's petition for rehearing requesting deletion of the 60 percent condition (Pet. App. 25a-32a). The court of appeals affirmed on the merits (Pet. App. 9a-12a).[2]

---

[2]The court rejected the Commission's jurisdictional claim that Transco was not presently "aggrieved" by the Commission's order (Pet. App. 5a-8a). The Commission had argued that the earliest Transco could suffer any aggrievement would be after the conclusion of a rate proceeding under Section 4 or 5 of the Natural Gas Act and the issuance of a Commission order setting just and reasonable rates.

We do not abandon this argument. However, since the court of appeals decided this case on the merits and we support its ruling, we do not press the reviewability issue at this time.

ARGUMENT

In this case, the court of appeals concluded that the 60 percent capacity condition imposed by the Commission in Transco's certificate was "clearly not arbitrary or capricious" but rather rested upon a "principled rationale * * *" (Pet. App. 11a). Accordingly, it upheld the condition under "the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity" (*id.* at 9a). That ruling was proper, and further review by this Court is not warranted.

1. Through the rates it charges for transportation and sales of gas, a regulated pipeline such as Transco recovers the costs of providing that service as well as a return on its investment. Its overall rates are designed to provide sufficient revenues to cover all of its costs, including fixed costs, *i.e.*, costs which do not vary with the volume of gas transported or sold by the pipeline, such as investment in pipeline facilities, depreciation and taxes.

Petitioner argues (Pet. 11-12) that the Commission had the affirmative duty "*prior* to construction" to determine whether the proposed facilities were of the proper size to serve the present or future public interest. Having made the determination that the facility in issue here met those requirements, the Commission, so the argument runs, may not "in the same breath * * * impose a rate penalty condition" once annual output falls below 60 percent of capacity. This argument ignores the Commission's continuing duty to serve the public interest.

As the court of appeals reasoned in rejecting this argument (Pet. App. 10a), "the public also has an interest in promoting the optimal use of facilities which have been constructed at the most efficient scale. The

public interest would be ill-served by the proliferation of offshore pipelines not built to the most efficient scale or by the use of either inadequate or oversized pipelines. It is part of the Commission's responsibility to consider such factors, and it is not inconsistent to require that a pipeline be utilized at 60 percent of its capacity and to determine that the pipeline is required by the public convenience and necessity."

Petitioner argues alternatively (Pet. 7-8, 8-9, 10), however, that the Commission's 60 percent condition is properly viewed as a limited, "one-time test," running for one year only, from the end of the first 12-month period following installation of the proposed facilities. Under this interpretation, petitioner asserts that it has satisfied the 60% condition. This contention is not well founded.

The Commission has consistently interpreted the regulation to require 60 percent utilization in *all* succeeding years (see Pet. App. 4a).[3] In doing so, it has determined that the future public convenience and necessity require that the facilities be utilized at not less than 60 percent of their annual available capacity. Indeed, the fact that the Commission specified "future

---

[3]In 1975, two years before the petitioner submitted its application for the instant certificate, the Commission held that the 60 percent requirement had continuing applicability (*Trunkline Gas Co.*, 54 F.P.C. 1087, 1092-1093 (1975)):

> A single resolution of the 60 percent load factor condition is not what is intended by the language of paragraph "A(4)." The policy of Section 2.65 is intended to be one of continuing applicability and paragraph "A(4)" reflects that policy objective. The Commission recognizes that all off-shore facilities may not be connected to unlimited supplies of gas which will enable the facilities to be operated at a 60 percent load factor in perpetuity; however, when the time comes that any particular facility may be limited in the supply of gas available to it, the Commission will consider the merits of modifying the 60 percent requirement.

rate proceedings" in its statement of policy (18 C.F.R. 2.65) indicates that it never intended the 60 percent requirement to be a "one-time test." In the Commission's judgment, the principal purpose of enforcing the 60 percent utilization requirement (by permitting pipeline operators such as Transco to recover costs invested in the facility as though it were utilized at 60 percent capacity) is to protect consumers from paying unnecessary costs associated with over-designed, under-used facilities. See *Acker* v. *United States*, 298 U.S. 426, 430-431 (1936).

Manifestly, this is a proper regulatory aim. The Commission's primary duty under the Natural Gas Act is to protect gas consumers. This is accomplished in part through its broad authority to condition certificates of public convenience and necessity. See *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 391 (1959). Under the Act, the Commission is obliged to determine whether certification is in the "present or *future* public convenience and necessity" 15 U.S.C. 717f(e) (emphasis added). The proper exercise of this power does not mean that before imposing conditions on a certificate the Commission must be able to predict the future based on documentary evidence. "Rather, we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961), citing *Atlantic Refining Co.* v. *Public Service Commission of New York supra*, 360 U.S. at 391.

It is settled that when an agency is charged with the administration of a statute, its interpretation of that statute is entitled to great weight. *Udall* v. *Tallman*, 380

U.S. 1, 16 (1965). It follows that where, as here, "the construction of an administrative regulation * * * is in issue, deference is even more clearly in order." *Ibid.* The Commission's interpretation of its own regulation is reasonable, is consistent with the purposes of the Natural Gas Act, and should be controlling.

2. Petitioner further contends (Pet. 10) that circumstances have changed since 1968, when the Commission issued its statement of policy requiring 60 percent utilization of offshore transmission facilities. It is asserted that these changed circumstances— particularly the rapid depletion of offshore fields—have made it impossible for the company to meet the 60 percent condition.

The court of appeals properly rejected this claim (Pet. App. 11a-12a). While it clearly understood the significance of recent natural gas shortages, it also recognized that, as a reviewing court, its role was a limited one (*id.* at 12a):

> Congress has * * * placed substantial responsibilities in the hands of the Commission, and presumably that body is also aware of any declining production in the Louisiana fields. It is not totally irrational, arbitrary, or capricious for the Commission to attempt to deal with these important, complex issues in the manner which it has employed in this case. We may not substitute our judgment for that of the Commission. *Cf. Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 98 S. Ct. 1197, 55 L.Ed. 2d 460 (1978).

That the Commission is acutely aware of the problem of declining production is made clear by 18 C.F.R. 2.65(a)(4), which specifically provides an opportunity for

waiver of the 60 percent requirement. Moreover, the Commission has made it plain from the policy's inception that it intends to take a flexible approach in enforcing the requirement (see note 3, *supra*).

3. The court of appeals properly rejected petitioner's additional claim—which it repeats here (Pet. 12, 14-15)—that the 60 percent condition is confiscatory and an improper curtailment of the pipeline's right to recover its prudently invested costs. The mere fact that future gas supplies are not known, but can only be estimated, does not bar the Commission from relying on the applicant's estimates and holding the company to recovering its costs on the basis of those estimates for which the pipeline was built. As the court below cogently stated (Pet. App. 10a-11a):

> [B]ut all business decisions are based upon estimates of the future. If Transco's best estimates indicate a small field, then it certainly could have declined the certificate and applied for a pipeline with a lower capacity. Indeed, it argues that the 60% condition actually works to force companies to hedge their bets by underestimating the supply of natural gas and undersizing the proposed facilities in order to recover their investments. It appears to us that the practical effect of the regulation is to place a little more pressure on companies to refine their estimates so that they will construct facilities of an optimal size. Certainly, no prudent investor would deliberately undersize his pipeline if his best information indicated a substantial possibility of a large field with the attendant profits.

Moreover, the Commission has noted that "[t]he fact that a pipeline's source reserves will ultimately deplete is a concern that can be accommodated through proper

depreciation of the facilities." *Trunkline Gas Co.*, 54 F.P.C. 1087, 1092 (1975). Depreciation rates may be set independently for offshore facilities on a field by field basis. In this case, Transco's application requested authorization to construct a large diameter transmission facility designed for joint use with other pipeline companies, as opposed to a lateral, gathering line connected to a particular field. Therefore, Transco is not limited to a single, depleting field for its source of supply; rather, it can take advantage of other areas of undeveloped reserves to ensure at least 60 percent utilization of available capacity.

4. Finally, contrary to petitioner's contention (Pet. 13), the decision below is not in conflict with the District of Columbia Circuit's decision in *Algonquin Gas Transmission Co.* v. *FPC*, 534 F. 2d 952 (D.C. Cir. 1976). In *Algonquin*, the Commission issued temporary certificates to a pipeline company to permit the sale of excess volumes of synthetic natural gas. The Commission applied to the temporary certificates the same rate condition that governed the company's production and sale of synthetic natural gas pursuant to an original certificate. The original certificate condition provided that the company could not, "without prior Commission approval," file a rate schedule under Section 4 of the Act, 15 U.S.C. 717c, that calculated fixed unit costs on the basis of less than full design capacity production.

The court of appeals in *Algonquin* did not find the condition in the original certificate invalid. Rather, it concluded that the Commission could not automatically impose that condition on the temporary certificates without additional consideration. The court noted (534 F. 2d at 956) that the condition in the original certificate "must be read as including the implied condition that

* * * Commission approval must not be unreasonably withheld * * *." The purpose of including the condition in the original certificate was "to protect consumer interests against inflated costs until the Commission has sufficient operating data before it to make a more sophisticated appraisal of the costs and benefits of doing business." *Ibid.* Accordingly, if the Commission concluded on sufficient evidence that it was in the public interest to impose the condition on the company's temporary certificates, "it should provide specific findings supporting that conclusion." *Id.* at 957.

Here, in contrast, the Commission has not limited Transco's opportunity to initiate a Section 4 rate making proceeding seeking recovery of costs invested in the facilities. Nor has the Commission interpreted the 60 percent condition as rigid or arbitrarily binding on Section 4 proceedings. Consistent with the approach suggested in *Algonquin* (534 F. 2d at 957-958), the Commission here carefully weighed the relevant policy and consumer considerations in monitoring the construction of high-cost offshore facilities to assure that they were not oversized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

JEROME M. FEIT
BARBARA J. WELLER
Attorneys
Federal Energy Regulatory Commission

FEBRUARY 1980

DOJ-1980-02